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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1948.

No. 813

HENRY PLOUGH,
Petitioner,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

No. 814

MARJORIE A. HANSON, as Administratrix of the Estate of GORDON M. HANSON, Deceased,
Petitioner,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

No. 815

ELMER VAN SLYKE,
Petitioner,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

No. 816

CAROLINE LYNCH, as Administratrix of the Estate of MYRON GEORGE LYNCH, Deceased,
Petitioner,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

To the Hon. Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

Summary Statement of Matter Involved.

On January 8, 1944 a truck owned by the Iroquois Gas Corporation, being driven by one of their employees—the petitioner Henry Plough, was struck by one of the respondent's trains at a grade crossing known as Murphy's Crossing in Cattaraugus County, New York (Fol. 280, p. 94); the other petitioners or petitioners' intestate-fellow-employees were passengers in the truck (Fols. 296, 297, p. 99); Lynch was killed; Hanson was killed and Van Slyke and Plough were injured (Fol. 315, p. 105).

The railroad crossing was considerably higher than the road (Fol. 195, p. 65); on approaching the crossing you cannot see the tracks (Fol. 195); as you get nearer the tracks you must look behind you in order to see the tracks (Fol. 196); the entire area is hilly country in the heart of Cattaraugus County (Fol. 198, p. 66) the crossing (Fol. 545, p. 182) as appears from the Exhibits makes an elongated "X" forming a 23 degree angle.

As the train approaches this crossing from its last previous stop, in a northerly direction, the track is considerably down grade (Fol. 228, p. 76); because of the gullies, hills and depressions it is difficult to hear the whistle of a train (Fol. 261, p. 87).

On the day of the accident Plough was driving a truck which had a compressor back of the cab (Fol. 285, p. 95) which completely obscured the view from the back window of the cab.

They had started out in their truck that morning from Salamanca, about twenty miles from the crossing (Fol. 292, p. 98) and picked up their crew; Lynch sat in the front seat next to the driver (Fol. 297, p. 99) and Van Slyke and Hanson sat in the back (Fol. 297). Plough had been over this crossing dozens of times (Fol. 299) and knew the time that this morning train made the crossing (Fol. 299, p. 100).

If this particular train had been on time it would have crossed before the plaintiffs arrived at the crossing (Fol. 301, p. 101). When Plough approached the crossing all he could see was the embankment and when he looked again at high levels all he could see was the rails, but no train (Fol. 302); the road was icy and he was going 15 to 18 miles an hour as he approached the crossing (Fols. 305-306, p. 102).

Plough testified that he was listening for a whistle but heard none (Fol. 309, p. 103); he did not see the train at any time and when he got onto the crossing, was hit (Fol. 311, p. 104); Van Slyke testified that he heard no whistle (Fol. 391, p. 131); Kathryn C. Mooney, a passenger on the train which had the accident, testified that the train did not slow down at the crossing (Fol. 434, p. 145) and that no whistle had been blown just before the accident (Fols. 434, 435, 436); Alfred Norman Holquist, a former railroad man (Fols. 458, 459, p. 153) was on the train which caused the accident. He was in the first coach behind the engine (Fol. 460); he saw the truck on the road before the accident for some time (Fols. 461-465, p. 154); the train did not whistle (Fols. 467, 469, p. 156). The train was going 65-70 miles per hour (Fol. 467); Kenneth B. Disher, also a passenger on the train (Fol. 476, p. 159) testified: that the whistle did not blow before the accident and that no signal was given (Fol. 480).

Deposition of Edward C. Wirtner, the engineer on this train, who has since died, was read. He testified the train was late (Fol. 537, p. 179)—about 16 minutes; he claims he blew a whistle at the regular whistling post (Fol. 533, p. 185) and that he rang a bell (Fol. 544, p. 182); he testified that they were drifting down hill at the crossing (p. 186); he admitted that he stopped the whistle some distance before the crossing, he thought it was about 30 feet (p. 191); also that after the collision the train continued anywhere from 800 to 1600 feet (p. 187). The fireman testified that he noticed the truck on the highway and watched it proceeding towards the crossing; he testified that a whistle was blown (p. 204); the truck was a quarter to a half mile from the crossing when he first saw it (p. 205); for nearly half a mile the fireman claims he saw the truck, "he never told the engineer about it" (p. 206); the fireman testified that the speed of the train was increasing as it approached the crossing (p. 209).

The First Trial.

The first trial of these actions was held before Honorable John Knight and a jury at a Trial Term of the United States District Court for the Western District of New York in December, 1945, and resulted in a jury verdict in favor of the defendant and against each of the plaintiffs for no cause of action and judgment dismissing the complaints of each of said plaintiffs was made and entered on December 27, 1945 (p. 2); thereafter motions for new trials were denied on June 21, 1946 (p. 3); each of the plaintiffs appealed to the United States Court of Appeals for the Second Circuit; on November 5, 1947 said United States Court of Appeals for the Second Circuit (Judge Swan dissenting) reversed the judgments below and directed new trials in all four actions. The majority and dissent-

ing opinions in the first trial have been reported in *164 Fed. 2nd 254*. Petition for re-hearing was denied by the said Second Circuit Court, on November 21, 1947 (p. 29).

Respondent, Baltimore and Ohio Railroad Company, thereafter petitioned this Court for a writ of Certiorari in each of said actions, and said petition was denied on March 29, 1948, as reported in 92 L. Ed. 697 (p. 3).

The Second Trial.

All four actions were then tried a second time before the Honorable Harold P. Burke and a jury at a Trial Term of the United States District Court for the Western District of New York in June, 1948 in the City of Rochester, New York and the jury brought in verdicts in favor of each of the petitioners (p. 3).

On August 16, 1948 judgments were entered in favor of the petitioners; the Respondent appealed to the United States Court of Appeals for the Second Circuit, and the appeals were argued together before that court.

Said Court of Appeals for the Second Circuit (Chief Judge Learned Hand, dissenting) reversed the judgments below and directed new trials in all four actions (pp. 317-333).

The majority and dissenting opinions in the second trial are printed in full at pages 318-321 of the Record.

The reversal was based solely upon an alleged error in the charge to the jury given by the trial court (pp. 320-323).

The trial court's charge is printed in its entirety in the record at pgs. 294-306, but that part of the charge upon which the majority of the Circuit Court reversed is sum-

marized on p. 319 by the Honorable Judge Chase. It appears from that summary that the majority of the Circuit Court gathered that the Trial Judge meant to charge that the jury might consider that the speed at which the train approached the crossing might amount to negligence on the part of the railroad.

The majority of the Court found that this was error and was substantial enough to require a reversal even though the jury not only returned general verdicts for each of the petitioners, but also found special verdicts in which the following questions were answered as indicated (Fols. 925-927, p. 309):

"1. Did the engineer sound an adequate and timely signal of the train's approach to the crossing? Answer, No.

"2. Was the speed of the train excessive or dangerous as it approached the crossing, considering all the circumstances? Answer, Yes.

"3. Was the driver of the truck guilty of any negligence contributing to the accident? Answer, No."

The Chief Judge, Learned Hand, however, in his dissenting opinion stated (page 321):

> "The jury's answer to the first question appears to me to demand an affirmance, for by it they said that the engineer did not 'sound an adequate and timely' signal. The only dispute in the testimony was, not whether he began to blow too late, considering his speed; but whether he blew at all."

He added that, although there might conceivably be some confusion to the jury, that: "It is the office of special verdicts to avoid the effects of misdirections by the judge. They are valuable—very valuable, I believe—just because when they are used, the charge need not be impeccable. I should think that this was a perfect illustration of their

serviceability; for it seems to me gratuitous to assume that possibly the second answer infected, so to say, the first."

It is principally upon this theory of the use and effect of the special verdicts that this petition is based.

Jurisdictional Statement.

Judgments in the four actions were entered by the Circuit Court of Appeals for the Second Circuit on the 14th day of February, 1949 (pgs. 322-325 of the Record).

This petition was filed in May, 1949.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C., Sec. 347).

By its decision herein and the judgments entered thereon, the Circuit Court of Appeals for the Second Circuit has: (a) rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter; (b) in fact, has rendered a decision which appears to be in conflict with the decision of the same Circuit Court of Appeals, with reference to the meaning and validity of Rule 49 of the Federal Rules of Civil Procedure, U. S. C. A. Title 28 Sec. 723 c (Federal Rules of Civil Procedure, Rule 49(b)—General verdict accompanied by answer to interrogatories); (c) further, that the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be settled by this Court, namely, the validity and value of said Federal Rule of Civil Procedure, 49; and (d) has decided an important question of local law (State of New York) in conflict with applicable local decisions. (Rule 38 of the Rules of the Supreme Court, 5(b)).

The Court of Appeals, Sixth Circuit, in the case of *Pennsylvania R. Co. vs. Stegaman,* 22 Fed. 2nd 69, (1927), said, on p. 72, par. 6:

> "* * *. *If the jury had thus indicated a finding* (by the use of special questions) *that the statutory signals were not given, this reversal*—very unfortunate on account of the history of the case—*would have been unnecessary.* As it is, if the case is tried again upon substantially the same record, the issue will be very simple. If the statutory signals were not given, there is no defense; if they were, there can be no recovery." (Italics ours)

In a case decided by the Court of Appeals for the Second Circuit: *Foster vs. Moore-McCormack Lines, Inc.,* 131 Fed. 2nd, 907, the Honorable Jerome N. Frank, writing for the Court said, on p. 908:

> "Appellant might have dissipated that darkness by asking, under Rule 49, Rules of Civil Procedure * * * for a special verdict or for a general verdict accompanied by the jury's answers to interrogatories * * *. But that wise rule, which would ensure keeping the jury in its proper place, is, for some dark reason, seldom used."

The Chief Judge, in the principal case, as above quoted, likewise thought that the use of the special questions avoided any problems raised by the charge.

The Questions Presented.

a) Was the charge of the Trial Judge upon the second trial erroneous?

b) If the charge was erroneous was it sufficiently prejudicial to justify a reversal of the judgments?

c) Did not the answers to the special interrogatories by the jury cure any possible error in the charge?

Reasons Relied Upon for Allowance of Writ.

Judgments in favor of the petitioners herein were reversed by the Circuit Court of Appeals on the sole ground that the Court did not make clear in the charge that "there are no restrictions upon the rate of speed at which a railroad may run its trains over a highway crossing in the open country without being guilty of negligence if reasonable signals are given."

It is submitted that the Trial Court's charge did make this statement clear, namely, that there was a relationship between the proper speed and the giving of reasonable signals.

On the other hand, however, if the majority of the Court meant that the Trial Court's charge was in error because the law of New York is that there are no restrictions whatsoever upon the rate of speed at which a railroad may run its trains at a crossing, the majority of the Court was in error as to the law of the State of New York, which will be clarified in our Brief.

Furthermore, if the Court was right in stating this to be the law of the State of New York, and that the Trial Court's statement was confusing, the use of the special interrogatories under Federal Rule of Civil Procedure 49 indicated that any such error would be harmless and certainly not prejudicial.

If by answers to the interrogatories the jury found that reasonable signals were not given, it must then follow that under that circumstance a railroad might be negligent if it ran its trains at a high rate of speed at a crossing.

The decision of the Circuit Court in this case is in conflict with the decisions in other Circuits and in fact with decisions in the Second Circuit itself, and is in conflict with

the law of the State of New York which it purports to follow.

WHEREFORE, your petitioners pray that a Writ of Certiorari issue to review the judgments entered in the above causes on the 14th day of February, 1949 in the United States Circuit Court of Appeals for the Second Circuit, said causes being numbers 21197, 21198, 21199 and 21200 on the docket of the said Circuit Court.

Respectfully submitted,

HENRY PLOUGH,
ELMER VAN SLYKE,
MARJORIE A. HANSON, *as Administratrix,*
CAROLINE LYNCH, *as Administratrix,*
Petitioners.

By FRANK G. RAICHLE,
Counsel for Petitioners.

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BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

The Opinion.

The opinion in the United States Circuit Court of Appeals for the Second Circuit (Circuit Judges L. Hand, Swan

and Chase, Judge Chase writing, Chief Judge L. Hand dissenting), was filed February 14, 1949 and appears at pages 318-322 of the Record.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U. S. C., Sec. 347. The Circuit Court was in these cases in conflict with the decisions of other Circuit Courts of Appeals; in conflict with the decisions of the same Circuit Court of Appeals; has decided an important question of Federal law which has not been, but should be settled by this Court; and has decided an important question of New York State law in conflict with the applicable New York decisions. (Supreme Court Rule 38, par. 5(b).)

Judgments were entered in these cases by the United States Circuit Court of Appeals for the Second Circuit on February 14, 1949.

Statement of Case.

The facts have already been set forth in the preceding petition and are hereby adopted and made a part of this Brief. We emphasize only that there was ample evidence of the failure of the railroad to sound adequate signals and that the finding by the jury that it did so fail, in the language of the Chief Judge of the Second Circuit in his dissenting opinion, "demanded an affirmance."

Specification of Errors.

The Circuit Court erred in holding: that the charge of the Trial Court was erroneous; they erred in the statement of the applicable law of the State of New York; they erred in finding error in the Trial Court's charge sufficiently

harmful to survive the findings of the jury in answer to specific interrogatories, and they erred in that they vitiated the value and validity of Rule 49 of the Federal Rules of Civil Procedure.

ARGUMENT.

POINT I.

The charge of the Trial Court was not erroneous.

The applicable law of the State of New York has uniformly been held to be: that the speed of a train over a highway crossing is not of itself a negligent act *if the signals required by law are observed.*

Warner vs. N. Y. C. R. R. Co., 44 N. Y. 465;
Hunt vs. Fitchburg R. R. Co., 22 A. D. 212;
McKelvey vs. D. L. & W. R. R. Co., 253 A. D. 109.

The Circuit Court of Appeals, writing through Judge Chase, cites this rule and cites the above cases.

Neither the Circuit Court of Appeals nor any decision of the New York State courts gives the railroads the absolute right to run at any speed. Every decision holds that there are no restrictions upon the rate of speed *only if reasonable signals are given.*

The Circuit Court of Appeals merely held then that, in its opinion, the court below did not make that rule of law clear in its charge (p. 319).

The majority opinion proceeds to narrow down the error in the charge (p. 319). It holds that the Trial Court charged correctly: that the railroad had the paramount right of way, but that failure to give an adequate and timely signal would amount to negligence.

The majority of the court further held, on p. 320, that the Trial Court explained to the jury (1) that the railroad would be guilty of negligence if adequate warnings were not given, and (2) the railroad would also be guilty of negligence if the jury found that, *considering all the circumstances,* the speed of the train was excessive.

It was apparently the opinion of the majority of the Circuit Court that the error consisted in leaving to the judgment of the jury what speed reasonably prudent persons would have maintained under like circumstances, and, says the majority of the court: "This was contrary to the law of New York as the above cited cases clearly show."

It then becomes necessary to look at those cases which are the cases also cited in this Brief—above.

In the case of *Warner vs. N. Y. C. R. R. Co.,* 44 N. Y. 465, at p. 468, the New York court pointed out that there was conflicting evidence with reference to the signals, and said: "These were acts of prudence required by law to be observed and more than usually necessary when the train was running at a high rate of speed. The statute prescribes that a sign shall be posted * * *. The defendants were alleged to be negligent as to the precaution of ringing the bell as required by law. *The rate of speed increased the danger and negligence in case any precaution was omitted.*"

In the case of *Hunt vs. Fitchburg R. R. Co.,* 22 A. D. 212, at p. 213 the Court said: "If the warning given is timely and reasonable, the company is not negligent, no matter how rapidly the train may be run"; but the Court also said: "The speed of the train, be it ever so great, is not in itself a negligent act, but when great speed is reached the notice of its approach must be commensurate with it. *The warning must be adequate to the increased speed.*"

The language in *McKelvey vs. D. L. & W. R. R. Co., supra,* is very much the same. In every one of these cases and in numerous other New York State cases, which will be cited at the end of this point, the Court always ties to the statement that the trains may run at almost any speed at a crossing, the condition that *this is so only if the train gives due and timely warning.*

After reviewing these cases, look again at the conclusion of the charge of the Trial Court (Fol. 891, p. 297): "If you conclude upon all the evidence that the railroad company was not negligent in either of these respects, that is, the sounding of a timely and adequate signal of the train's approach, and the speed of the train *under these circumstances,* then there may be no recovery in any of these cases."

It is submitted that this was a sufficient charge under the law of the State of New York.

Also see *Bassett vs. Delaware & Hudson Co.,* 62 Fed. 2nd 74, in this very Second Circuit Court of Appeals, in which the Court held that the requirement as to speed at a crossing depended on the nature of the crossing.

Also see *Canadian Pacific Railway Co. vs. Slayton,* 29 F. (2nd) 687. The same Circuit found that the jury might find the rate of speed at a crossing negligent, the place of collision being in a village.

See *Martin vs. N. Y. C. and Hudson River R. R. Co.,* 27 Hun 532 (Affd. 97 N. Y. 628), which case in turn cites *Continental Improvement Co. vs. Stead,* 95 U. S. R. 161, in which it is said: "Reasonable and timely warning may depend on many circumstances. It cannot be such if the speed of the train be so great as to render it unavailing."

Also see *Baker vs. Lehigh Valley R. R. Co.*, 248 N. Y. 131, 133; *Flynn vs. Long Island R. R. Co.*, 289 N. Y. 283, 285, and *Carr vs. Pennsylvania R. R. Co.*, 225 N. Y. 45.

In the opinions in the last three cases the speed of the train at the crossing was very much involved in the conclusions reached as to negligence of the railroad.

POINT II.

Any error in the Trial Court's charge was overcome by findings of the jury in answer to special interrogatories under Rule 49 of the Federal Rules of Civil Procedure.

The jury not only returned general verdicts for each of the petitioners but also found special verdicts in which the following questions were answered as indicated (Fols. 925-927, p. 309):

"1. Did the engineer sound an adequate and timely signal of the train's approach to the crossing? Answer, No.

"2. Was the speed of the train excessive or dangerous as it approached the crossing, considering all the circumstances? Answer, Yes.

"3. Was the driver of the truck guilty of any negligence contributing to the accident? Answer, No."

As stated in the petition for this Writ, the Chief Judge, in his dissenting opinion, stated, p. 321:

> "The jury's answer to the first question appears to me to demand an affirmance, for by it they said that the engineer did not 'sound an adequate and timely' signal."

It is respectfully submitted that the dissenting view of the Chief Judge was the correct view, namely that if there was any error in the charge that the answers to the specific

interrogatories overcame the error or reduced any error which existed to complete harmlessness and should not require another trial of this case.

It is the very purpose of Rule 49 of the Federal Rules of Civil Procedure to avoid what happened in this case as the Chief Judge further said in his dissenting opinion: "It is the office of special verdicts to avoid the effects of misdirections by the judge. They are valuable—very valuable, I believe—just because when they are used, the charge need not be impeccable; * * *."

It is upon this thesis that this petition for a writ is based, to wit: we ask this Court to determine the validity of a Federal Rule of Civil Procedure which seems to have such practical value.

The very purpose and interpretation of the Rule is involved in this decision.

Rule 49 of the Federal Rules of Civil Procedure (U. S. C. A., Title 28, Section 723(c)) provides in Section (a) thereof for special verdicts and in Section (b)—the section used in these cases—for a general verdict accompanied by answered interrogatories.

The obvious purpose of Section 49(b) is to clarify the whole subject of jury verdicts and to clarify for the Appellate Courts the basis upon which the jury made its findings. As was said in *Moore's Federal Practice Under The New Rules, Vol. 3, Sec. 49.03, Note 5:* "The general verdict may be confused because the jury misunderstood the law, whereas their specific findings of fact,—and the jury after all is only a fact finding body—are a better guarantee of their intention."

That it was also intended to overcome any harmless errors on the part of the Trial Judge appears in the case of

Pacific Greyhound Lines vs. Zane, 160 Fed. 2nd 731, 737, in which the Court held: "The verdict under the evidence might stand if it could be clearly shown (as below indicated) that it rested upon satisfactory proof of actual fraud, but * * * it must fail if it rested on proof of constructive fraud. Had there been a special or fact * * * verdict, or if the general verdict had been coupled with answers to fact—interrogatories clearly indicating that the general verdict was rested on proof of actual fraud, *we would know to a certainty that giving the instructions on constructive fraud was harmless error.*"

As was said in the editorial note 7 in the last above cited case, "The Federal Rules of Civil Procedure, Rule 49 (28 U. S. C. A.) following Section 723(c), were designed to encourage and facilitate the use of the special verdict, or in the alternative the general verdict accompanied by the jury's answers to interrogatories as to questions of fact. As an Appellate court, we have no power to direct Trial judges to call for fact-verdicts, but a general and unexplained lump verdict does not cover up substantial errors at the trial."

Conversely fact-verdicts do overcome errors at the trial.

The Circuit Courts have generally construed this to be the function of the special interrogatories.

In the case of *Bassett vs. Delaware & Hudson Co.,* 62 Fed. 2nd 74, in the Second Circuit, three similar questions to the ones used in these cases were sent to the jury. In that case the jury answered that a bell had been sounded, but it did answer that the train was running at a dangerous rate of speed; and that there was no contributing negligence. There was a general verdict for the plaintiff. However, the Court of Appeals did not find that submitting the question of

speed to the jury as one of the three separate questions was error, but that the error was the denial of the court's request for a specific charge "that a rate of speed of even 40 to 50 miles over the crossing in question would not be any negligence." In the *Bassett* case it must be remembered that the jury had found that a bell was rung continuously for a distance of 80 rods from the crossing.

It is interesting to note that in none of the cases in which special interrogatories were sent to the jury has it been found error to ask as a separate and distinct question whether or not the speed of the train at the crossing was reckless and negligent. *If it is improper to discuss speed as a factor of negligence, why* did not the Court, in the Bassett case, find that the error was committed in submitting this as a question? (No objection was made by Respondent in the principal cases to any of the interrogatories.)

In the case of *Canadian Pacific Railway Co. vs. Slayton*, 29 Fed. 2nd, 687, which was decided by the *Second Circuit* in 1928, special questions likewise were submitted to the jury. The questions were: "Was the bell rung?" Answer, "No."; the second question—"Was the train running at a careless and negligent rate of speed as it approached and passed over this crossing?" Answer, "Yes".

In the *Slayton* case the Court found specifically that it was not an error to permit witnesses to give an estimate of the speed of the train, thereby submitting to the jury the question of speed at the crossing.

In the *Slayton* case, in spite of the fact that the jury found that a bell was rung, the Court found no error in permitting the jury to pass upon the question of whether or not the speed at the crossing was careless and negligent, and the Court said, at p. 688:

> "There was evidence offered by the defendant in error that the train went at a speed of from 50 to 60 miles per hour, whereas the testimony of the plaintiff in error put the speed at 35 miles up to within 16 to 18 rods of the crossing, and that it was then reduced to from 18 to 20 miles per hour. The distance the train traveled after the occurrence before it was brought to a stop, and the testimony of the defendant in error's witnesses, raised a jury question as to this claim of negligence."

The Court then proceeded to state that where special circumstances existed "ordinary care would require an engineer in charge of the train to pass over such a crossing at a moderate rate of speed. The speed should not be so great as to render unavailing the warning. * * * The test is the particular danger of the crossing, even though it be in a village * * *. The question is usually one of fact for the jury."

It would certainly appear from this case that the fact that the crossing was in a village was simply one of the circumstances which might be considered on the question of negligent speed. Obviously, the Second Circuit Court of Appeals has not laid down any absolute rule that speed must not be a factor.

It is strongly urged upon this Court that the same general verdict would have been forthcoming and the trial court would have been justified in entering judgment as it did even if the jury had answered the second question in the negative, namely, that the speed of the train was not negligent at the crossing, so long as the jury answered the first question in the affirmative, namely that adequate and timely signals were not sounded.

The function and use of Rule 49 is most clearly pointed out in the case of *Pennsylvania R. Co. vs. Stegaman*, 22 Fed.

2nd 69, decided in the Sixth Circuit in 1927. The Court said at the outset of that case:

> "Upon the trial there was substantial evidence that the statutory warnings by whistle and bell were not given. Hence there was a case for the jury upon the issue of the railroad's negligence.
>
> "In addition to the above stated ground of negligence, the trial court submitted to the jury two additional grounds: the second, that the train was running at a rate of speed higher than due care under the circumstances permitted; the third, that warning signals or precautions in addition to those required by the statute (Gen. Code Ohio, Sec. 8853) should have been given by the railroad. It is more or less probable, perhaps very likely, that the jury would have found negligence upon the first ground stated, if neither of the others had been submitted, but they might not. Their conclusion may be based upon either the second or the third ground; and if there was error in submitting either of these there must be a reversal. We are compelled to find that there was error in both respects."

The Court recognized that high rate of speed when taken in connection with other factors and circumstances might become an element in constituting negligence, but found no such other factors were pleaded in the Stegaman case (Page 71; Par. 4).

The Court, in discussing the case, found also that there was no basis for concluding that due care required a repetition of the statutory signals, but at the end of the case the Court makes this very significant statement (Page 72; Par. 6):

> *"We may add that the case would have been a very appropriate one for taking the opinion of the jury by a special question as to the specific negligence which they found to exist. The trial judge may often, on his own motion, submit such a question, with benefit to the public interest. If the jury had thus indicated a finding that the statutory signals were not given, this reversal*

> *—very unfortunate on account of the history of the case—would have been unnecessary.* As it is, if the case is tried again upon substantially the same record, the issue will be very simple. If the statutory signals were not given, there is no defense; if they were, there can be no recovery." (Italics ours.)

Obviously, if in the Stegaman case the Court had asked the three questions as in the principal case, and the jury had found that no signal was given the judgment would have been affirmed.

Subsequent to the decision in the Stegaman case, *(supra)*, the *Court of Appeals, Second Circuit* had a similar question before it in *Foster vs. Moore-McCormack Lines, Inc.*, 131 Fed. 2nd, 907 (2 C. C. A.) In that case the Honorable Jerome N. Frank, writing for this Court, said, on page 908:

> "The trial Court, pointing out that there was a conflict of evidence, charged the jury that it could, and must, determine for itself, whether the injury had aggravated the existent * * * condition, and that, if it did so, appellant would be liable in damages for the aggravation. Appellant objects that this portion of the charge is not 'warranted by the evidence', for there could be no causal connection between the injury in question and the appellee's subsequent * * * condition. We cannot agree. There was a conflict of the testimony and it was for the jury to determine the issue of fact. Whether the jury carefully weighed the testimony in the light of the judge's instructions, of course, we do not know, and, indeed, are forbidden to inquire. There was a general verdict, and such a verdict 'throws its mantle of impenetrable darkness over the operations of the jury'. *Appellant might have dissipated that darkness by asking, under Rule 49, Rules of Civil Procedure * * * for a special verdict or for a general verdict accompanied by the jury's answers to interrogatories.* A trial judge, sitting without a jury, or an administrative agency, must make findings of fact, and also state the legal rules justifying decisions, yet a jury,

which is theoretically supposed to confine itself to nothing but fact-finding, is curiously freed of the requirement to reveal that and how it has discharged its sole legitimate function, *unless the trial judge or one of the parties invokes Rule 49. But that wise rule, which would ensure keeping the jury in its proper place, is, for some dark reason, seldom used.*"

In the light of the last two quoted decisions the jury having disclosed, as the result of such proper use of interrogatories, that it had based its decision first upon a finding that no adequate warning had been given, should dispose of any doubts left about the meaning or effect of the judge's instructions.

POINT III.

This Court should grant a writ of certiorari and should reverse the judgments of the Second Circuit.

It is respectfully submitted that these cases call for the exercise by this Court of its supervisory powers and it should grant this petition for a writ of certiorari, and thereafter should review and reverse the judgment of the Circuit Court.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1948.

No. 813

HENRY PLOUGH,
Petitioner,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

No. 814

MARJORIE A. HANSON, as Administratrix of the Estate of GORDON M. HANSON, Deceased,
Petitioner,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

No. 815

ELMER VAN SLYKE,
Petitioner,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

No. 816

CAROLINE LYNCH, as Administratrix of the Estate of MYRON GEORGE LYNCH, Deceased,
Petitioner,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

ANSWERS TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF ANSWERS.

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Respondent.

ANSWERS TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF ANSWERS.

To the Hon. Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your respondent, for its answer to the petition for writs of certiorari, respectfully shows:

Statement.

The above actions involve a grade crossing collision between a train and a truck. They have been tried twice. The first trial resulted in verdicts of no cause of action (Fol. 6, p. 2). On that trial the presiding judge correctly charged the law of New York regarding the defendant's duty at grade crossings. On the second trial no new witnesses were called by either party, and the testimony of each witness was substantially the same as that which he had previously given (See record on first appeal). However, the judge who presided at that trial gave, over the defendant's exception, an erroneous charge on the applicable New York law (Fols. 882, 883, 887, 888, 890, 891, pp. 294-297). This trial resulted in judgments totaling $112,139.61 (Fol. 11, p. 4). The Court of Appeals for the Second Circuit, recognizing the obvious prejudice resulting from this erreoneous charge, reversed the judgments of the District Court and directed a new trial (pp. 317-25).

The error above referred to related to the speed of defendant's train. It is the law of New York (and petitioners do not here contend otherwise) that if a train properly signals its approach to a country crossing, no negligence can be predicated upon the rate of speed at which it approaches. The District Court charged, however, that if the speed of defendant's train was excessive or dangerous to the users of the highway and if it exceeded the speed that reasonably prudent persons would have maintained under like circumstances, that would amount to negligence on the part of the railroad. Defendant's exception to such portion of the charge having saved this question for review, the Circuit Court held that the charge was contrary to the

law of New York and that the defendant was entitled to a new trial in which the applicable law would be clearly and correctly stated (pp. 320-321).

These are typical grade crossing collision cases. No unusual facts are involved. The plaintiffs or their decedents, riding in a truck owned by their employer Iroquois Gas Corporation, were struck by one of defendant's trains traveling at a speed estimated by different witnesses to be anywhere from 35 to 70 miles per hour (Fols. 467, 548, 623, pp. 156, 183, 208). The plaintiffs Plough and Van Slyke testified that they heard no whistle, and they called three of the train's passengers, who likewise testified that they did not hear the whistle blow (Fols. 309, 391, 435, 467, 480, pp. 103, 131, 145, 156, 160). Defendant on the other hand produced evidence as to whistling which on the first appeal Judge Swan of the Circuit Court described as "overwhelming". The defendant called three disinterested witnesses in addition to its train crew who testified emphatically that the whistle blew from up beyond the whistling post a quarter of a mile away until just before the crash, when, according to the testimony of the fireman, the engineer released the whistle handle to apply the emergency brake (Fols. 771, 772, 809, 820, 821, 826, 827, 831, 834, 848, 849, 850, 855, 856, 553, 570, 571, 572, 573, 610, 611, 612, 630, 657, 658, 872, pp. 257, 258, 270, 274, 276, 277, 278, 283, 284, 285, 286, 185, 190, 191, 204, 210, 219, 220, 291).

One of these was Mr. William Kessler a farmer who resided a short distance from the crossing. Mr. Kessler was harnessing a team of horses in his yard at the time the accident occurred. He testified on the second trial, as he did on the first, that he heard the train whistle for the crossing and, looking up, observed that it was coming round the curve where the whistling post was located; that he turned

back to his work, heard a number of blasts and then the crash (Fols. 771, 772, 826, pp. 257, 258, 276). He also testified that the interval between the last whistle and the crash was not more than a second or two (Fols. 820, 821, p. 274).

Edna Kessler, the daughter of Mr. Kessler, was in the outhouse at the time of the collision (Fol. 830, p. 277). She testified that she heard "several prolonged blasts" and immediately thereafter the crash (Fols. 831, 848, pp. 277, 283).

Milford Crandall, a young man who worked on the Kessler farm, was standing with Mr. Kessler when the accident occurred. He testified that he heard the train whistle and, looking up, observed that the train was near the whistling post, approximately a quarter of a mile from the crossing. He then heard several whistles from the train and then the crash (Fols. 855, 856, pp. 285, 286).

The testimony of the above witnesses did not change between the first and second trials. The charge of the Court did—and erroneously so. Such error, the Circuit Court properly felt, was prejudicial and required a new trial.

ARGUMENT.

POINT I.

The District Court erred in its charge to the jury, and reversal upon this ground by the Circuit Court was proper.

Without question, it is the law of New York that if a train properly signals its approach to a country crossing, no negligence can be predicated upon the rate of speed at which it approaches. The following cases do not begin to exhaust the authorities which support this proposition:

Warner vs. N. Y. C. R. R. Co., 44 N. Y., 465, 469.

"The law places no restrictions upon the rate of speed at which the trains may be run across the country at the crossings of the Highways or elsewhere; nor is the train required to stop or reduce the speed at such places. Nor does the law subject the railroad company to liability for damages occurring from the rate of speed, if the signals required by law are observed."

Hunt vs. Fitchburg R. R. Co., 22 A. D., 212, 213 (3rd Dept.).

"If the warning given is timely and reasonable, the company is not negligent, no matter how rapidly the train may be run."

Phelps vs. Erie R. R. Co., 134 A. D. 729, 731 (3rd Dept.).

"The speed of a train over an ordinary highway crossing in the open country, be it ever so great, is not of itself a negligent act."

McKelvey vs. D. L. & W. R. R. Co., 253 A. D. 109, 110 (4th Dept.).

"Defendant had a paramount right of way at this crossing. There being no ordinance regulating speed at this point, the defendant had the right to propel its trains over the highway at any rate of speed it chose, provided it gave due and timely warning of their approach."

Lee vs. Pennsylvania R. R. Co., 244 A. D. 558, 562 (4th Dept.) Reversed on other grounds, 269 N. Y. 53.

"The crossing was in the open country, and in a sparsely settled portion of the community. The law places no restriction upon the speed at which the defendant may operate its cars at this point, and the fact that the train was going 60 miles an hour did not charge the defendant with negligence provided due and timely warning of the approach of the train was given."

Goodrich vs. Erie R. R. Co., 183 A. D., 189, 190 (3rd Dept.).

"The defendant was not negligent in running its train over the crossing at a rate of speed better than 50 miles an hour."

Young vs. Erie R. R. Co., 158 A. D., 14 (4th Dept.).
Orafina vs. N. Y. State Rys., 148 A. D. 417 (4th Dept.).

In exact contradiction to the rule of law laid down in the above cases, the Trial Court herein charged that if the speed of defendant's train was excessive or dangerous to the users of the highway and if it exceeded the speed that reasonably prudent persons would have maintained under like circumstances, that would amount to negligence on the part of the railroad. The Court's entire charge on the question of speed was as follows (Fols. 882, 883, 887, 888, 890, 891, pp. 294-297):

"The evidence introduced by the plaintiffs for the purpose of establishing negligence on the part of the railroad related to the question of whether an adequate and timely signal of the train's approach to the crossing had been given by the engineer, and to the question whether the speed of the train as it approached the crossing was excessive or dangerous in view of all the circumstances. * * *

By the circumstances, I mean all the testimony bearing upon the topography of the highway and of the railroad, the angle at which the railroad tracks cross the highway, the view that was obtainable by users of the highway as they approached the crossing, and all the other evidence which touched upon the occurrence involved. * * *

The other question relating to the alleged negligence upon the part of the railroad was with reference to the speed at which the train approached this crossing. There is no speed limit prescribed by law. There is some evidence that the railroad had a rule which prescribed a speed limit of 45 miles an hour. Rules, such as these, are made by the railroad to govern its employees. Whatever the rule was regarding the speed that was prescribed by the railroad, that is not the

test of whether the railroad was negligent in regard to speed. It might be negligent under certain circumstances if the train was going at a lesser speed than prescribed by the railroad, and under certain other circumstances it would not be negligence to even exceed the speed prescribed by the railroad. The test here again in regard to whether the speed of this train amounted to negligence on the part of the railroad is whether the operation of the train under these circumstances was reasonable and whether it amounted to the exercise of reasonable care and caution under all the circumstances. * * *

If upon a consideration of all the evidence you conclude that this train was being operated under these particular circumstances, and that the speed was excessive or dangerous to the users of the highway, and that it exceeded the speed that reasonably prudent persons would have maintained under like circumstances, then that would amount to negligence upon the part of the railroad."

This charge which was so opposed to the well settled law of New York and which so vitally affected the merits of the plaintiffs' claim could not help but operate to the defendant's prejudice; and defendant's counsel duly noted his exception thereto (Fol. 919, p. 307).

In *Hunt v. Fitchburg R. R. Co., supra*, the Trial Court's charge on the subject of speed read as follows:

"I charge you, as matter of law, that the defendant in the operation of its trains upon that road in the open country was not bound to run at any rate of speed. It could operate its trains at a rate of speed as pleased it, but in approaching a crossing it was bound to exercise proper care, reasonable care, and that reasonable care which it must exercise in approaching a crossing depends, so far as its speed is concerned, upon all the surroundings, the nature and circumstances, and condition of the crossing, and whether or not it is a highway upon which there is little travel, or upon which there is a great deal of travel; whether or not the view is obstructed of an approaching train, or whether it

can be clearly seen. Various facts and circumstances may exist, and do exist, upon which that question of the negligence of the defendant in the operation of its trains rests. So that it is a question for you as to what rate of speed that train was running. * * * What does the evidence satisfy you with regard to the rate of speed of that train upon that occasion, when approaching this crossing, and in view of all the circumstances surrounding that crossing, in view of its condition as you find it from the evidence to be; was the train upon this occasion running at a dangerous rate of speed, so that you can say as a question of fact it was negligence?"

A comparison of that charge with the Trial Court's charge in the instant cases shows the following amazing similarity between them:

Hunt Case.	*Our Case.*
"It could operate its trains at a rate of speed as pleased it * * *."	"There is no speed limit prescribed by law." (Fol. 887, p. 296).
" * * * in approaching a crossing it was bound to exercise proper care, reasonable care, and that reasonable care which it must exercise in approaching a crossing depends, so far as its speed is concerned, upon all the surroundings, the nature and circumstances, and condition of the crossing, and whether or not it is a highway upon which there is little travel, or upon which there is a great deal of travel; whether or not the view is obstructed of an approaching train, or whether it can be clearly seen."	"The test here again in regard to whether the speed of this train amounted to negligence on the part of the railroad is whether the operation of the train under these circumstances was reasonable and whether it amounted to the exercise of reasonable care and caution under all the circumstances" (Fol. 888, p. 296). "By the circumstances, I mean all the testimony bearing upon the topography of the highway and of the railroad, the angle at which the railroad tracks crossed the highway, the view that was obtainable by users of the

highway as they approached the crossing, and all the other evidence which touched upon the occurrence involved." (Fol. 883, p. 295).

"What does the evidence satisfy you with regard to the rate of speed of that train upon that occasion, when approaching this crossing, and in view of all the circumstances surrounding that crossing, in view of its condition as you find it from the evidence to be; was the train upon this occasion running at a dangerous rate of speed, so that you can say as a question of fact it was negligence?"

"If upon a consideration of all the evidence you conclude that this train was being operated under these particular circumstances, and that the speed was excessive or dangerous to the users of the highway, and that it exceeded the speed that reasonably prudent persons would have maintained under like circumstances, then that would amount to negligence upon the part of the railroad." (Fols. 890, 891, p. 297).

The Appellate Division reversed a judgment for the plaintiff in the *Hunt* case solely because of the above charge. The Court said (p. 214):

> "Although it told the jury that the defendant was at liberty to operate its trains at any rate of speed it pleased, yet it at the same time instructed them that it must approach the crossing with reasonable care, and that so far as speed is concerned, reasonable care would depend very largely upon the condition of the crossing and the circumstances surrounding it. It does not call their attention at all to the fact that if the signals of approach are timely and adequate to the rate of speed used, then the very highest rate of speed would be consistent with reasonable care."

No statement could more aptly summarize the prejudicial error in the charge below, and the Circuit Court was obviously very much in accord with the New York Appellate Division when it directed a new trial.

POINT II.

The error in the Trial Court's charge was not overcome by the answers to the special interrogatories.

The Trial Court submitted two specific questions to the jury on the subject of negligence, one dealing with the speed of the train and the other with the adequacy of the warning (Fols. 925-927, p. 309). Petitioners' attempt to completely separate these two issues by contending that so long as the jury found that the warning was inadequate, the fact that they were erroneously charged on the question of speed did not harm the defendant.

The fallacy of such contention was immediately recognized by the Circuit Court. As Judge Chase pointed out, the adequacy of the warning given had to be determined not only as it related to the speed of the train, but also as it related to the propriety of such speed, i. e., whether the train was approaching the crossing at a speed greater than that at which a reasonably prudent person driving along the highway, as were the plaintiffs, would have expected it to approach. The Court felt that if the jury started its consideration of whistling with the premise that the defendant's train was going at an improper and negligent rate of speed, as they were permitted to do under the Trial Court's erroneous charge, they were bound to require a higher degree of care on its part than they would have if they started with the premise that the rate of speed was not improper.

The logic of the Circuit Court's reasoning is irrefutable. Two automobiles may be traveling fifty miles per hour, one on a country highway where the speed limit is fifty miles per hour and the other on a city street where the speed limit is twenty miles per hour. If a rule as to adequate warning

were to be applied to these two vehicles, is there any reasonable person who would not place a higher standard of care on the latter than on the former? Yet they are both going fifty miles per hour. So also in the instant cases, if the jury determined under the Trial Court's erroneous charge that defendant's train should only have been going twenty miles per hour and that it was actually going fifty, they could not help but require a higher degree of care with respect to warning signals than they would have, had they been correctly instructed that speed in and of itself is not negligence. It was not then a question of how much warning a train going at a speed of fifty miles per hour should have given; it was a question of how much warning a train going at an *improper* and *negligent* speed of fifty miles per hour should have given. No reasonable juror would apply the same standard of care in both cases.

If the Trial Court had charged the jury that as a matter of law the defendant's train was traveling at an excessive and dangerous rate of speed, could there be any argument but that this would have affected their determination of the question of the adequacy of the whistling? Here the jury found on the basis of the Court's erroneous charge that the train was traveling at an excessive and dangerous rate of speed. Could this erroneous finding have any less effect on their determination of the other question? Obviously not. The questions are interrelated, and the Trial Court's error affected them both. As stated by Judge Chase (Fol. 323, p. 320):

> "The natural reaction of the members of the jury would be to attempt to set as to signals some standard for a railroad operating a train negligently in respect to speed which would protect those crossing its track on the highway in spite of the 'excessive and dangerous' speed at which the train was being run."

In order for a general verdict to be sustained by written interrogatories under Rule 49(b) of the Federal Rules of Civil Procedure, at least one of the specific issues presented to the jury must be untainted by erroneous instructions. If the error in the Court's charge affects all the specific interrogatories, as it does in this case, there is no fair and proper finding of negligence upon which a general verdict can be based. There can be no rule of law, federal or state, which holds to the contrary. The Circuit Court properly decided that the defendant was entitled to a new trial in which the jury might determine the issues of negligence under correct instructions from the Trial Court. There is nothing in that ruling which requires a review by this Court. It is respectfully submitted, therefore, that these petitions for writs of certiorari should be denied.

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